BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOY J. RUSSELL	)	
Claimant	)	
	)	
VS.	)	Docket No. 1,053,065
	)	
HALLMARK SHOWCASE	)	
Self-Insured Respondent	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the December 16, 2010, preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh. Timothy E. Power, of Overland Park, Kansas, appeared for claimant. John D. Jurcyk, of Kansas City, Kansas, appeared for the self-insured respondent.

The Administrative Law Judge (ALJ) found that claimant failed to prove an injury that arose out of and in the course of her employment with respondent and, accordingly, denied her request for workers compensation benefits. The ALJ further found that if claimant suffered a repetitive trauma injury, her date of accident would be contemporaneous with her written report of accident. Therefore, notice and written claim were timely.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the December 15, 2010, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant requests review of the ALJ's finding that she did not prove an injury that arose out of and in the course of her employment. Claimant contends she suffered a series of repetitive traumas that either caused or, in the alternative, aggravated, accelerated or intensified her low back, hip and left knee conditions. She asks the Board to order respondent to provide her with medical treatment with Dr. Sean Wheeler and temporary total disability benefits from September 16, 2010, until she reaches maximum medical improvement or finds substantial gainful employment.

Respondent argues that the ALJ correctly held that claimant failed to prove she suffered personal injury by accident that arose out of and in the course of her employment.

Respondent also contends that in the event the Board finds claimant proved an accident that arose out of and in the course of her employment, her claim is barred by equitable estoppel, failure to provide timely notice, and failure to provide timely written claim.

The issues for the Board's review are:

(1) Did claimant prove she sustained an accidental injury that arose out of and in the course of her employment with respondent?

(2) If so, is her claim barred by the doctrine of equitable estoppel?

(3) Did claimant provide respondent with timely notice of her accidental injury and timely written claim?

FINDINGS OF FACT

Claimant worked for respondent as a merchandise assistant for approximately 17 years. She would check in product, take the product out of boxes, and put the product on shelves. She would set up the fixtures for the displays. She also worked the floor by running the registers and helping customers and kept the back room organized. She said about 75 percent of her job revolved around unloading and shelving product in the store.

Claimant is claiming a series of accidents from approximately January 2010 and each and every day worked thereafter. In January 2010, her workload increased because respondent was shorthanded. She was given additional duties but still was expected to continue performing her other work tasks. She started to develop some physical complaints in her low back and left hip down to her left knee and calf. Claimant did not report an injury to her supervisor because she thought she had to have a single major accident to make a claim under workers compensation. She did not realize that she could suffer a series of accidents caused by her increased workload.

On February 5, 2010, claimant sought treatment from her family physician, Dr. Tim Talbert. She complained of persistent low back pain that radiated down the left thigh into the calf. Claimant told Dr. Talbert that she had pain when bending and lifting at work. He ordered an MRI, which showed she had mild degenerative disc disease from L3-S1, with mild disc bulge at L4-5. Dr. Talbert referred claimant to Dr. Sean Wheeler, an orthopedist.

Claimant first saw Dr. Wheeler on May 21, 2010. She told him she had left leg pain every day for two to three months, which had started suddenly. She did not remember any accident that caused the pain. The pain was made worse by walking, sitting too long, lifting, bending, and rotation and extension of the back. Dr. Wheeler treated her with epidural injections and physical therapy. In June 2010, claimant was given restrictions of no lifting over 5 pounds, no climbing ladders, and no bending or twisting. She was also not to stand for long periods of time and was to have frequent rest periods. The length of her

work-shift was reduced to 6.5 hours. In August 2010, Dr. Wheeler raised her lifting restriction to 20 pounds and reduced her hours to 4 hours per day.

Claimant's medical treatment with Drs. Talbert and Wheeler was paid under her personal health insurance.

Claimant testified that even after seeking medical treatment, her condition continued to get worse. After she was given restrictions, she was basically sent to the front of the store working the floor and running the cash register. This required her to be on her feet all the time and made her back condition worse. Although she gave her employer her restriction slip, she did not indicate that she thought her back was hurt at work.

At some point, claimant was placed on either short term disability or family medical leave, or both.[1] She testified that she was not working in August 2010 or early September. She received a letter from respondent asking her to find out whether she could return to work with no restrictions by September 15. She saw Dr. Wheeler on September 13, at which time her lifting restriction was raised to 25 pounds but she was still only allowed to work 4 hours per day. Claimant said she worked 4 hours on September 14 and 4 hours on September 15. But on September 16 she received a call from her manager telling her she was being terminated. She has applied for long-term disability, but as of the date of the preliminary hearing, her application was pending.[2]

The first day claimant gave written notice to respondent of her work-related accident was October 19, 2010, when her attorney sent respondent her Written Claim for Worker's Compensation. Respondent received the written claim on October 20, 2010.

Claimant admitted she had back problems dating back to 2004 and 2005. She said she just had a strain of the low back. In addition, she had a previous workers compensation claim in 2006 when she hurt her back lifting a box of candles. At that time, she saw a doctor who told her most of her problems were arthritic in nature. Claimant said also that she had been seeing a chiropractor monthly for the last four years or so. She said the chiropractic treatments are not necessarily for her low back but were for overall health maintenance. She said that during the months before January 2010, she was able to perform her job without any problems or symptoms, had no work restrictions, and was not taking any medications for her back or leg.

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[1] Claimant's applications for either short-term disability or family medical leave were not made a part of the record.

[2] Claimant's application for long-term disability was not made a part of the record.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[3] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[4]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[5]

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[6] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[7] An injury is not compensable, however, where the worsening

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[3] K.S.A. 2010 Supp. 44-501(a).

[4] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[5] *Id.* at 278.

[6] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[7] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[8]

K.S.A. 2010 Supp. 44-508(d) and (e) state:

> (d) "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.
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> (e) ‘‘Personal injury’’ and ‘‘injury’’ mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker’s usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

K.S.A. 44-520 states:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that

[8] *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

> in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

K.S.A. 44-520a(a) states:

> No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation; or within one (1) year after the death of the injured employee if death results from the injury within five (5) years after the date of such accident.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[9] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[10]

ANALYSIS

Claimant worked for respondent for almost 17 years. Her job required prolonged standing and repetitive bending, stooping, lifting and reaching. Although claimant has had prior instances of low back and left knee problems, there is no evidence that claimant was under any permanent work restrictions or was symptomatic during the period of time immediately before she began experiencing the symptoms that are a part of the series of accidents alleged in this claim. Claimant testified that her work duties caused this reoccurrence of her back problems and her continued working made her back and left leg symptoms worse. There is no contrary evidence. This Board Member finds that at a mininum, claimant's work caused a temporary injury.

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[9] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. __, (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[10] K.S.A. 2010 Supp. 44-555c(k).

Respondent also disputes the ALJ's finding that claimant's date of accident for a series of accidents would be October 20, 2010, the date claimant provided respondent with the written notice of accident and, therefore, notice and written claim were timely.

In the Order, the ALJ said:

> Regarding the timely notice issue, if this is considered a repetitive injury the accident date, according to K.S.A. 44-508, would be contemporaneous with the written report of accident, since the claimant was not restricted from her duties by an authorized physician. Therefore, notice of injury was given within the required 10 days from the date of the accident.[11]

This Board Member finds that claimant suffered a series of accidents and, therefore, her date of accident is controlled by K.S.A. 2010 Supp. 44-508(d).

In *Saylor*,[12] the Kansas Court of Appeals held:

> In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker.[13]

Further, the court stated: "In this case, the 2005 addition to K.S.A. 2008 Supp. 44-508(d) creates the presumption that the legislature intended to change the date of injury for an 'accident' from the bright-line rule of the last day worked."[14]

Finally, respondent argues that claimant should be estopped from making a claim for workers compensation benefits because she submitted her medical treatment expenses to her private health insurance for payment instead of presenting them to respondent for payment under its workers compensation insurance coverage. Also, claimant applied for and received short-term disability benefits and or family medical leave and applied for long-

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[11] ALJ Order (Dec. 16, 2010) at 2.

[12] *Saylor v. Westar Energy, Inc.*, 41 Kan. App. 2d 1042, 207 P.3d 275 (2009), *rev. granted* May 18, 2010; see also *Mitchell v. Petsmart, Inc.*, 291 Kan. 153, 239 P.3d 51 (2010).

[13] *Saylor v. Westar Energy, Inc.,* 41 Kan. App. 2d 1042, Syl. ¶ 4.

[14] *Id.* at 1048; see also *Colvin v. Kansas Health Policy Authority,* No. 103,968, Kansas Court of Appeals unpublished opinion filed December 30, 2010.

term disability benefits. The Board has jurisdiction of this issue on an appeal from a preliminary hearing order because it constitutes a defense under K.S.A. 44-534a(a)(2).

Kansas has applied the doctrine of equitable estoppel in workers' compensation proceedings.[15] In *Marley*, the Kansas Court of Appeals held a claimant to the terms of his written agreement with respondent by finding claimant was estopped from denying he was an independent contractor.

> The doctrine of equitable estoppel requires consistency of conduct, and a litigant is estopped and precluded from maintaining an attitude with reference to a transaction wholly inconsistent with his or her previous acts and business connections with such transaction.[16]

However, "[o]ne who asserts an estoppel must show some change in position in reliance on the adversary's misleading statement."[17]

> A party asserting equitable estoppel must show that another party, by its acts, representations, admissions, or silence when it had a duty to speak, induced it to believe certain facts existed. It must also show it rightfully relied and acted upon such belief and would now be prejudiced if the other party were permitted to deny the existence of such facts.[18]

This Board Member does not find equitable estoppel applies to the facts herein. Claimant did not make a claim for workers compensation benefits while she was working because she did not understand that her series of microtraumas were compensable as accidents under workers compensation. She did not attempt to mislead respondent or receive benefits unjustly. Furthermore, it does not appear from this record that respondent would be prejudiced if claimant were permitted to proceed with a claim for workers compensation benefits.

CONCLUSION

(1) Claimant sustained personal injury by a series of accidents that arose out of and in the course of her employment with respondent.

(2) Claimant's claim is not barred by the doctrine of equitable estoppel.

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[15] *Marley v. M. Bruenger & Co., Inc.*, 27 Kan. App. 2d 501, 6 P.3d 421 (2000).

[16] *Marley*, 27 Kan. App. 2d 501, Syl. ¶ 1.

[17] *In re Morgan*, 219 Kan. 136, 137, 546 P.2d 1394 (1976).

[18] *United American State Bank & Trust Co. v. Wild West Chrysler Plymouth, Inc.*, 221 Kan. 523, 527, 561 P.2d 792 (1997).

(3) Claimant provided respondent with timely notice and timely written claim.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated December 16, 2010, is affirmed insofar as the findings of timely notice and written claim but reversed as to the finding that claimant failed to prove she suffered personal injury by a series of accidents that arose out of and in the course of her employment with respondent. This matter is remanded to the ALJ for further orders on claimant's requests for temporary total disability compensation and medical treatment.

IT IS SO ORDERED.

Dated this _____ day of March, 2011.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Timothy E. Power, Attorney for Claimant
John D. Jurcyk, Attorney for Self-Insured Respondent
Kenneth J. Hursh, Administrative Law Judge